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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 E. JEAN CARROLL,

4 Plaintiff,

New York, N.Y.

5 v.

20 CV 7311 (LAK)

6 DONALD J. TRUMP,

7 Defendant.

8 -----x

Motion

9 February 22, 2022
10 4:00 p.m.

11 Before:

12 HON. LEWIS A. KAPLAN,

13 District Judge

14 APPEARANCES

15
16 KAPLAN HECKER & FINK, LLP
17 Attorneys for Plaintiff
18 BY: ROBERTA A. KAPLAN
19 JOSHUA A. MATZ
ADAM BRESGI

20 HABBA MADAIO & ASSOCIATES, LLP
21 Attorneys for Defendant
22 BY: ALINA HABBA
23 MICHAEL MADAIO
24
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1 THE DEPUTY CLERK: E. Jean Carroll v. Donald J. Trump.
2 Counsel for movant, are you ready?

3 MS. HABBA: Yes, your Honor. Alina Habba representing
4 Donald J. Trump. I'm here with co-counsel Michael Madaio.

5 THE COURT: Good afternoon.

6 THE DEPUTY CLERK: Counsel for respondent, are you
7 ready?

8 MS. KAPLAN: We are. Roberta Hecker. I'm here with
9 my colleagues Adam Matz and Adam Bresgi, and my client E. Jean
10 Carroll.

11 THE COURT: Good afternoon, everyone. For the benefit
12 of people who are listening on the telephone connection, it is
13 unlawful to record or broadcast in any way this proceeding.

14 This is your motion, Ms. Habba. I'll hear you.

15 MS. HABBA: Yes, your Honor.

16 THE COURT: I'd appreciate it if you'd go to the
17 lecturn.

18 MS. HABBA: Sure.

19 Thank you, your Honor.

20 In November 2020, New York significantly expanded its
21 anti-SLAPP law. The law protects defendants in legal actions
22 involving public petition and participation. Under the revised
23 law, a defendant is entitled to additional rights and remedies
24 including attorneys' fees, costs, and punitive damages, among
25 other things.

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1 Here we have requested leave to amend our answer to
2 include the new broader anti-SLAPP law and preserve defendant's
3 rights accordingly.

4 Courts have regularly applied an extremely flexible
5 standard of freely grant leave to amend an answer when justice
6 so requires, absent a showing of undue delay, bad faith,
7 futility or prejudice to the plaintiff. In this circumstance,
8 none of these exist.

9 THE COURT: Why isn't amendment futile?

10 MS. HABBA: Well, your Honor, in this case --

11 THE COURT: Isn't it true that every court that has
12 yet ruled on the question has found this New York anti-SLAPP
13 law as amended to be inapplicable in federal courts?

14 MS. HABBA: No, your Honor. In the *Goldman* case as
15 well as the *Harris* case they found that this could be applied
16 in federal courts.

17 THE COURT: In all respects?

18 MS. HABBA: Yes. In all respects. And it was not
19 futile.

20 THE COURT: What about all the other cases?

21 MS. HABBA: This is the thing with this, your Honor.
22 The New York anti-SLAPP law was put in November 2020. We have
23 cases that go both ways, but the more recent cases do apply it
24 in federal court. I also think we should remember that this
25 case started in state court where it is applied. And was

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1 removed --

2 THE COURT: That's of absolutely no significance at
3 all. You are in federal court now.

4 MS. HABBA: Correct. And there are cases that apply.

5 THE COURT: In state court, your time for filing a
6 jury demand is when you file a statement of readiness. In
7 federal court, it's got to be filed much, much, much earlier.
8 Case gets removed from state court to federal court, you are
9 subject to the federal rule.

10 MS. HABBA: Your Honor, there's a couple of things you
11 mentioned. First in terms of timing, we are very early here in
12 this litigation. There has not been discovery exchanged, there
13 have not been depositions. It is not futile because even if
14 you take away the motion to dismiss or a possible motion for
15 summary judgment, we get attorneys' fees when we go to trial
16 under the anti-SLAPP law. So to prejudice us --

17 THE COURT: Maybe.

18 MS. HABBA: -- by not allowing it in at this point.

19 THE COURT: Maybe. Maybe you don't. Maybe you lose
20 at trial.

21 MS. HABBA: Which is fine, and then she won't be
22 paying our attorneys' fees. That's why I say it is not futile
23 and we get to preserve our interests at this point. We want
24 the ability to have those available to us.

25 THE COURT: The proposition I'm putting to you is

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1 there is very substantial authority for the proposition that
2 that statute does not apply in federal court. Exclamation
3 point. So what are you preserving?

4 MS. HABBA: I disagree with you, your Honor. As I
5 said, *Goldman* and *Harris* did apply it in federal court.

6 THE COURT: Hmm-hmm, and how many others said no?

7 MS. HABBA: I don't have the exact number, your Honor.

8 THE COURT: It is a lot.

9 MS. HABBA: Regardless, I don't see how amending our
10 answer at this point prejudices anyone, especially --

11 THE COURT: Except that then the plaintiff has to
12 litigate with you over the applicability of discrete provisions
13 of the anti-SLAPP law.

14 Are you saying, for example, that if I allow leave to
15 amend, you won't seek to stay all proceedings here until the
16 anti-SLAPP law claim is resolved? Are you committing to that
17 now?

18 MS. HABBA: No, because that's not procedurally how
19 this would work. We would --

20 THE COURT: That's the point.

21 MS. HABBA: Yes, but she would have an opportunity to
22 be heard on each of those motions at that time. We can
23 litigate it and argue those points.

24 THE COURT: She's having an opportunity to be heard on
25 it now. So are you.

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1 MS. HABBA: All due respect, your Honor, all I am
2 asking to be heard on is leave to amend the answer. Not the
3 applicability of the ins and outs of anti-SLAPP.

4 THE COURT: As you said yourself, in order to get
5 leave, you have to show that the amendment would not be futile.
6 And I'm saying to you that if I conclude that this statute
7 can't be applied in federal court, amendment would be futile by
8 definition. Isn't that true?

9 MS. HABBA: That is their argument, your Honor, yes.
10 But --

11 THE COURT: If I conclude that that argument is
12 correct, then it would be futile and I don't have to consider
13 anything else.

14 MS. HABBA: But I believe that you're prejudicing my
15 client by not allowing us the opportunity to go in --

16 THE COURT: How so?

17 MS. HABBA: Because we haven't delved into and it is
18 not ripe at this point to delve into an argument --

19 THE COURT: How can I decide futility without deciding
20 those questions?

21 MS. HABBA: Basically, your Honor, I think you're
22 thinking it more in terms of how the California law was
23 applied.

24 THE COURT: No, I'm not. I'm thinking of how in terms
25 of the plaintiff is urging me to decide it here.

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1 MS. HABBA: But plaintiff's resorting to misstating
2 and misapplying the law in an attempt to morph a routine
3 procedural issue into an examination of the merits of every
4 claim, which we're not ready to do yet.

5 THE COURT: Except that when you moved for leave to
6 amend, it became your obligation, if challenged, to defeat
7 their argument that the amendment would be futile.

8 And I could cite you I think something of the nature,
9 because I asked my law clerk to look for them, and I stopped
10 her when we lost count, at least dozens and probably hundreds
11 of cases in the Second Circuit and in this court that decided
12 the merits of the legal sufficiency of a proposed amended
13 complaint or counterclaim on the issue of leave to amend,
14 because it is essential to deciding whether the amendment would
15 be futile.

16 MS. HABBA: Judge, if I may. In the *Goldman* case, and
17 I would like to read an excerpt of it because I think it's on
18 point with what you are saying.

19 Mrs. Reddington simply seeks to amend her pleading to
20 include anti-SLAPP counterclaim and affirmative defense. There
21 was not an invocation of special summary judgment procedures
22 and they offered no argument as to why a litigant would be
23 unable to bring an anti-SLAPP counterclaim at all, merely
24 because a portion of the anti-SLAPP statute containing special
25 summary judgment rules asserted conflicts with Rule 56.

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1 THE COURT: The argument here is a lot broader.

2 MS. HABBA: I'm not following why it's broader, your
3 Honor.

4 THE COURT: As I understand the argument is the whole
5 thing can't be applied in federal court. Period. Exclamation
6 point.

7 MS. HABBA: But I have case law that says the opposite
8 in New York.

9 THE COURT: I may or may not agree with it.

10 MS. HABBA: You have that right. I agree with the
11 cases that do.

12 THE COURT: I'm glad.

13 Answer this question. Let's get away for the moment
14 from the special procedural provisions. One respect in which
15 this statute is debatable, to say the least, is that it
16 purports to set its own standard for what a plaintiff has to
17 have on day one of a case that is otherwise covered by the law.
18 Right? Higher than in other cases, isn't that true?

19 MS. HABBA: I don't follow what you are saying.

20 THE COURT: You don't follow.

21 MS. HABBA: Is the Court to say in the first case -- I
22 don't think amending an answer puts her in a position where she
23 has to completely argue her complaint. That's later in the
24 litigation. We are not there yet, your Honor.

25 THE COURT: I understand your timing argument. That's

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1 not what I'm talking about.

2 Your position is that the SLAPP law applies to this
3 case, proposition one. Yes?

4 MS. HABBA: My position is that we should be able to
5 preserve the right to bring up the SLAPP law defenses when the
6 time is appropriate, yes.

7 THE COURT: Regardless of whether as a matter of law
8 you have any rights at all.

9 MS. HABBA: I have rights, but I think this is
10 applicable here. It is exactly for this. When somebody
11 mentions something about a public figure, and she has admitted
12 she is also a public figure in this limited purpose, you are
13 allowed under the First Amendment to respond to those claims.

14 THE COURT: Nobody is talking about that.

15 MS. HABBA: That's anti-SLAPP.

16 THE COURT: The statute purports to change the
17 standard and require a plaintiff, if challenged, to demonstrate
18 without the benefit of discovery even that the claim has a
19 substantial basis in fact and law, failing which, the case gets
20 thrown out, and there is liability for damages. Right?

21 MS. HABBA: If you apply anti-SLAPP to a motion, if we
22 file a motion, yes, that would be the standard, substantial law
23 of fact.

24 THE COURT: All right. Now, Rule 11 of the Federal
25 Rules of Civil Procedure governs the standard that has to be

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1 met in a federal case with respect to a pleading. It has to be
2 supported by reasonable basis in law and fact, to briefly
3 summarize it without quoting it all. Right?

4 MS. HABBA: Yes.

5 THE COURT: That standard is lower than you claim the
6 anti-SLAPP statute requires, right?

7 MS. HABBA: Correct.

8 THE COURT: Now, in *Pappas v. Philip Morris* just a
9 couple of years ago, the Second Circuit reiterated the
10 principle of the *Erie* case and *Hanna v. Plumer* in the Supreme
11 Court, both of them, and said, not surprisingly, to anyone who
12 has been to law school, in a case in federal court where there
13 is a conflict between state and federal law, federal courts
14 apply federal law, not the state law. True? You agree so far?

15 MS. HABBA: Yes.

16 THE COURT: And according to the Second Circuit,
17 quoting *Hanna v. Plumer*, procedure is the legal process for
18 enforcing rights and duties recognized by substantive law and
19 for justly administering remedy and redress for disregard or
20 infraction of them.

21 That's what it says, quoting the Supreme Court.

22 Now, how can you reconcile the substantial basis in
23 law and fact standard purportedly created by the New York
24 statute with applying it -- let's put it a different way --
25 with the Rule 11 standard which is more forgiving, but which

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1 also creates remedies for failure to comply?

2 MS. HABBA: Your Honor, I think that every litigant is
3 entitled to have all options, both federal options that you
4 mention, that we are entitled to if we did not have anti-SLAPP.
5 And in this case, where anti-SLAPP is applicable, we should be
6 able if we so choose to use those remedies.

7 THE COURT: Well, I understand that's your position.
8 I think it comes as a huge surprise to the Supreme Court and
9 the Second Circuit.

10 MS. HABBA: Other courts themselves have found this in
11 this exact situation and stated the provision creating a cause
12 of action also makes it clear that an anti-SLAPP litigant may
13 obtain costs and attorneys' fees without using these
14 procedures.

15 THE COURT: What court's language are you quoting
16 there?

17 MS. HABBA: I'm quoting the Eastern District of New
18 York, your Honor.

19 THE COURT: Last time I looked, the commission on my
20 wall is every bit as good on the commission on the wall of that
21 judge. Right?

22 MS. HABBA: You're right, your Honor.

23 THE COURT: I'm clearly not bound by that, right?

24 MS. HABBA: Nope.

25 THE COURT: All right. So let's go on from there.

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1 Let's assume for the sake of argument that I gave you leave to
2 amend. Ms. Carroll would have to respond to that pleading,
3 right?

4 MS. HABBA: To the amended answer?

5 THE COURT: And counterclaim.

6 MS. HABBA: And the counterclaim, yes.

7 THE COURT: Would you agree that her answer to that
8 pleading, if you're right about the SLAPP law applying in
9 federal court, would have to include any compulsory
10 counterclaim she might have?

11 MS. HABBA: Correct.

12 THE COURT: And wouldn't such a compulsory
13 counterclaim, if she chose to assert it, include a counterclaim
14 against Mr. Trump asserting that your assertion of the SLAPP
15 standard applies to his pleading?

16 MS. HABBA: She absolutely can assert that.

17 THE COURT: Okay.

18 MS. HABBA: That would be right.

19 THE COURT: If you're right about this applying in
20 federal court, then isn't what happens this. In order to
21 decide whether she has a substantial basis in order to respond
22 to your motion, I also have to decide whether Mr. Trump has a
23 substantial basis for asserting that she lacked a substantial
24 basis. Isn't that true?

25 MS. HABBA: No, your Honor. At this point you just

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1 have to grant leave to amend the answer, and then when we file
2 a motion for summary judgment or a motion to dismiss, we will
3 go into the merits of the case, and those claims.

4 THE COURT: But, even before that, she could file a
5 motion, if you're right about the SLAPP statute, to stay your
6 proceedings and in any case to proceed with her anti-SLAPP
7 claim against Mr. Trump.

8 MS. HABBA: How could she have a defense for
9 anti-SLAPP when she is the plaintiff in this case? I'm not
10 following. Against my counterclaim, yes.

11 THE COURT: Against your counterclaim. That's exactly
12 what I am talking about.

13 MS. HABBA: Which is actually -- thank you for
14 saying -- I feel brings up the point this in no way prejudices
15 Ms. Carroll and her counsel.

16 THE COURT: So if you're right about this
17 applicability of the statute, in order to decide who had a
18 substantial basis, we pretty much have to decide the merits of
19 the underlying case. Don't we?

20 MS. HABBA: I don't think so, your Honor, I don't
21 think so.

22 THE COURT: Except that what you would have
23 accomplished by it is that if she prevailed, she would be
24 entitled not only potentially for damages, to get damages from
25 Mr. Trump, but to cause him to pay her attorneys' fees; yes?

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1 MS. HABBA: Absolutely. And if that is what happens,
2 that is what happens. That is what litigation is. It is about
3 giving us the right to litigate these issues. That is all I'm
4 asking today. Not to get into the merits.

5 THE COURT: I know you want not to get into the
6 merits. I do understand that. I've got that on board.
7 Repetition isn't going to get it any more firmly on board. I
8 question whether you have the right to do what you are seeking
9 to do. Because it seems to me it is entirely inconsistent with
10 the notion of futility.

11 Now, it's lovely that you have, you know, a minority
12 view among my colleagues that you are entitled to do that. I'd
13 argue it too if I were in your shoes, but it may not be the way
14 I resolve this matter.

15 MS. HABBA: Okay, your Honor.

16 THE COURT: Okay. Anything else you want to say on
17 the motion?

18 MS. HABBA: I did want to mention the timing issue
19 that counsel for Ms. Carroll brought up.

20 THE COURT: Go ahead.

21 MS. HABBA: Thank you. Well, despite the misleading
22 statements by plaintiff upon examination of procedural
23 history --

24 THE COURT: If you spoke any faster, it would be
25 simply a blur and it's close already.

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1 MS. HABBA: Okay. The delay here that she claims
2 exists does not exist. He was the sitting president, we filed
3 this a year after the amendment. He was a sitting president
4 for a portion of that. And as the Court knows, the Department
5 of Justice stepped in and we were waiting on the Second
6 Circuit, which we're still waiting on, a decision which would
7 effectively dismiss Ms. Carroll's case.

8 THE COURT: How is that an excuse?

9 MS. HABBA: I'm not giving an excuse. I am going
10 through the procedure to respond to their papers on the record.

11 THE COURT: But, look, if it's not an excuse, then it
12 doesn't matter. The fact of the matter is, you didn't file
13 this application to amend for something like 14 months after
14 the statute was amended and became effective. That's the delay
15 they're complaining about. And to tell me that he was the
16 sitting president, I don't see how it excuses the delay.

17 MS. HABBA: We can't litigate when there is a sitting
18 president, your Honor, that's the first thing.

19 THE COURT: You can't litigate while you are a sitting
20 president? Are you kidding?

21 MS. HABBA: When she filed it, it was stayed until --
22 and then the Department of Justice stepped.

23 THE COURT: When was it stayed?

24 MS. HABBA: From January until November, I can look at
25 the procedural history, your Honor.

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1 THE COURT: When was it removed to this court?

2 MS. HABBA: When the Department of Justice stepped in,
3 which was a few months -- let's see. Even if you take that
4 away, and I'm sorry I don't have the date right in front of me.
5 My co-counsel can give it to me. But, we are talking about a
6 year. In New York, leave to amend is freely given. A year is
7 not a long time.

8 THE COURT: Sometimes.

9 MS. HABBA: Okay. But in this case, we had a few
10 months where the Department of Justice stepped in, the Second
11 Circuit just heard our argument, and we are waiting on that.
12 Intentionally we filed this as soon as we stepped in.

13 THE COURT: You say you are waiting on it.

14 MS. HABBA: We are.

15 THE COURT: Well, you know, that's a tactical decision
16 you made.

17 MS. HABBA: I didn't make the decision.

18 THE COURT: Somebody did. It doesn't matter who made
19 it. I mean, the question is not whether you delayed unduly.
20 The question is whether your client is chargeable with an undue
21 delay.

22 MS. HABBA: Right. And I'm telling you that a year in
23 New York courts is not undue delay. Courts have found in New
24 York that four years is not even a delay.

25 THE COURT: Courts have found that periods shorter

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1 than a year is an undue delay. Depends on the circumstances.

2 MS. HABBA: Of course, your Honor.

3 THE COURT: And the fact your previous counsel either
4 elected or decided not to do it is not an excuse. The Second
5 Circuit has said that.

6 MS. HABBA: Your Honor, if I could just give you a
7 public policy argument in closing.

8 The defendant is perfectly willing to argue as to the
9 applicability of each and every aspect of the law at the
10 appropriate time. But a ruling to the contrary --

11 THE COURT: This is your time.

12 MS. HABBA: Okay, your Honor. But a ruling to the
13 contrary -- this is my argument when it comes to public policy
14 here -- would be a slippery slope, which would render the
15 anti-SLAPP law toothless in federal court. And that would
16 encourage any SLAPP case that's filed in federal court,
17 effectively people would be forum shopping. If somebody wants
18 to file a defamation suit and I go in federal court, then I
19 know anti-SLAPP's not going to be used against me, and I am
20 going to bring my case in federal court. That's what we would
21 like to prevent, your Honor. New York courts should be a
22 unified system. I understand there is a difference between the
23 federal and the state levels.

24 THE COURT: That was a losing argument in *Erie v.*
25 *Tompkins*.

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1 MS. HABBA: Your Honor, I think that we have to
2 recognize when New York State did this a year ago, there was a
3 reason. They expanded it exactly for this reason.

4 THE COURT: I'm sure they did. But, if New York State
5 decides to say that we shouldn't allow people under 35 to
6 practice law in federal courts, or that we shouldn't allow
7 non-residents to practice in federal courts, or people should
8 have to post a security deposit to bring a medical malpractice
9 case, or that the standard for stockholder derivative actions
10 are different in New York, that the demand futility argument is
11 governed by different rules in New York, it doesn't affect
12 litigation in federal courts.

13 MS. HABBA: No, your Honor. But my argument would
14 still stand that people would forum shop and bring a federal
15 court defamation case because they can't bring the anti-SLAPP
16 defense here.

17 THE COURT: Sometimes it is a product of a federalist
18 system.

19 MS. HABBA: Your Honor, we respectfully --

20 THE COURT: In state court, a dispositive motion --
21 forget about SLAPP cases -- absent a contrary order, stays
22 discovery. Am I right in New York?

23 MS. HABBA: Yes, your Honor.

24 THE COURT: Federal court not so. People do shop for
25 forums because of that rule all the time. In state court, any

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1 order affecting substantial rights is immediately appealable as
2 of right. Isn't that true?

3 MS. HABBA: Yes.

4 THE COURT: Federal court has a final judgment rule.
5 You can't appeal anything until the case is over, with rare
6 exceptions. Now, do you deny that that substantially affects
7 choices of forums?

8 MS. HABBA: No, your Honor. I'm just raising the
9 public policy concerns that would be a result of your decision,
10 that's all.

11 THE COURT: Well, the public policy concerns are
12 exactly the same in all of those cases.

13 MS. HABBA: Okay, your Honor. So, in closing we
14 respectfully request the motion to amend be granted.

15 THE COURT: Thank you.

16 MS. HABBA: Thank you.

17 THE COURT: Ms. Kaplan.

18 MS. KAPLAN: Good afternoon, your Honor. Let me start
19 with I think the last point.

20 THE COURT: Before we get to the last point. Let's
21 get to something that I want to be sure about, because it's not
22 consistent with what I understand, and I'd like to see if you
23 agree with your adversary or not.

24 Was any portion of this period from the November 10,
25 2020, effective date of the amendments to the anti-SLAPP law,

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1 up until the removal to federal court, a period during which
2 there was a stay of proceedings in effect?

3 MS. KAPLAN: There was a stay, your Honor. The stay
4 that she referred to was not in federal court. It was in state
5 court. The stay was lifted just before defendant invoked the
6 Westfall Act to bring it here. We had about two weeks, one or
7 two weeks of discussion about discovery, and then the case was
8 removed. They removed it promptly upon the lifting of that
9 stay.

10 THE COURT: When was the stay interposed in state
11 court?

12 MS. KAPLAN: I can get you those dates, your Honor.
13 But it had to do with the application to the court of appeals
14 in the Zervos case as I recall.

15 THE COURT: Was that after the effective date of the
16 SLAPP law or before?

17 MS. KAPLAN: I think it was before, your Honor. But
18 my colleagues will check and I'll get that you answer.

19 THE COURT: So when you claimed an excused delay of
20 whatever it was, 12 or 14 months, I don't think you mentioned
21 that.

22 MS. KAPLAN: No, we did not mention that. It wasn't,
23 it wasn't more than two or three months, your Honor, but we did
24 not mention that, and for that I apologize.

25 THE COURT: In other words, two or three of the 12 or

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1 14 months?

2 MS. KAPLAN: Yes. It was a relatively short period
3 and then the Supreme Court decided the Vance case, and
4 immediately upon the Supreme Court granting the Vance case, the
5 trial court judge in New York Supreme lifted the stay and then
6 we were here two weeks later.

7 THE COURT: I would appreciate a joint letter from
8 counsel with the facts concerning that stay.

9 MS. KAPLAN: We absolutely will get that to you, your
10 Honor. It was a stay that they requested.

11 THE COURT: Well, yes, I understand that. But, I
12 certainly can't fault them for not bringing a motion in a
13 period in which proceedings were stayed, if those were the
14 terms of the stay. I don't know what the terms were either.
15 It may have been a stay of discovery. I just have no idea. I
16 need to know what the facts are.

17 MS. KAPLAN: They did, your Honor -- we could address
18 this in a letter too -- they did make a motion on these precise
19 grounds in the Zervos case in the Commercial Division back in
20 October.

21 THE COURT: Of which year?

22 MS. KAPLAN: October 2021. So it was three months
23 before they made it here. They were well aware of these
24 issues. We could get you those papers if your Honor would like
25 them.

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1 THE COURT: I think both sides should submit them
2 together.

3 MS. KAPLAN: Absolutely.

4 THE COURT: As a matter of record.

5 MS. KAPLAN: The only other thing I would point out on
6 timing, your Honor, is in every single case that my friend on
7 the other side cited, every single one of those cases, the
8 applications to amend or to insert New York anti-SLAPP in the
9 case were made well before they were made here. So in terms of
10 when people were on knowledge, either about the passage of the
11 statute or about retroactivity after Judge Rakoff issued his
12 decision, every single one of the cases she cites, even the
13 ones she says are on her side, were brought to the court's
14 attention well before December 2021 when they brought it to
15 your attention here.

16 THE COURT: Okay.

17 MS. KAPLAN: With respect to forum shopping, I was
18 going to start with that. A couple of things. One, as your
19 Honor said, *Erie* squarely deals with the forum shopping point.
20 Two, it is more than a little ironic that the party that
21 actually brought the case to federal court by invoking the
22 Westfall Act is complaining of forum shopping in federal court.
23 But, I think your Honor obviously understands those arguments.

24 In terms of futility, let me see if I can correct the
25 record. We are not aware of any court that has applied the

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1 procedures of 70-a, which is the procedural aspect of this law
2 in federal court -- in the Second Circuit. There is a Maine
3 decision that's cited applying First Circuit law under *Erie*.
4 It gets a little confusing because they are applying the New
5 York statute, but for *Erie* purposes it is First Circuit law.
6 And that First Circuit law was expressly cited and disagreed
7 with by the Second Circuit in *La Liberte* where they dealt with
8 *Erie* for the purposes of the California anti-SLAPP statute.
9 There are cases that apply 76-a which is not the procedural
10 part of the New York anti-SLAPP law. That's the malice
11 standard. And apply --

12 THE COURT: It is the what standard?

13 MS. KAPLAN: That's the standard that applies malice
14 to these cases. The *New York Times v. Sullivan* standard. But
15 as we say in our papers, your Honor, that standard clearly
16 already applies. We concede it applies. This case is with all
17 respect not going to SCOTUS on that issue.

18 On whether *New York Times v. Sullivan* should be
19 overruled, I'll point out that the defendant Trump has made
20 statements criticizing *New York Times v. Sullivan*, but that is
21 what it is. Parties obviously have a right to make
22 inconsistent statements.

23 The one part of the statute that the courts are
24 uniform does not apply in this district in federal court under
25 Second Circuit law are the procedural standards. The CPLR

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1 motion to dismiss and the CPLR summary judgment that my
2 colleague on the other side keeps referring to. Judge Caproni
3 in the *National Academy of Television* case following the very
4 clear reasoning by Judge Jacobs, Chief Judge Jacobs I believe
5 he was.

6 THE COURT: By judge who?

7 MS. KAPLAN: Jacobs wrote the decision in *La Liberte*.
8 Squarely applying that reasoning said that for exactly the
9 reasons your Honor expressed you cannot --

10 THE COURT: Could you slow down, too.

11 MS. KAPLAN: I apologize.

12 THE COURT: It is my old ears.

13 MS. KAPLAN: It is my too fast speaking. I apologize.

14 That you cannot displace the federal rules for a
15 motion to dismiss, the standards for a motion to dismiss, the
16 federal rules for summary judgment under 56, with the New York
17 CPLR standard.

18 THE COURT: What about Rule 11?

19 MS. KAPLAN: I think, your Honor, it is unclear at all
20 whether attorneys' fees provision.

21 THE COURT: Slower.

22 MS. KAPLAN: It is unclear -- I think Judge McMahon
23 points this out in the *Planned Parenthood* case, it is unclear
24 whether the attorneys' fees provision applies in federal court.
25 Because it is to be found in the procedural part of the

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1 statute. The 70-a part of the statute, not the 76-a part of
2 the statute.

3 But as your Honor points out, there are standards that
4 apply to seeking fees in federal court under Rule 11, that are
5 very, very different than the no substantial basis in fact or
6 law standard set forth in the New York anti-SLAPP law. That
7 issue has not been squarely decided in this district. But I
8 think what your Honor is saying is the better reasoning.

9 THE COURT: Isn't the standard whether it can
10 reasonably be characterized as procedural, and that applies to
11 remedies?

12 MS. KAPLAN: Correct, your Honor. So what's
13 substantive here is the malice standard. That applies under
14 76-a, but is completely futile here because we concede it
15 applies. And it applied anyway. And the rest of the New York
16 anti-SLAPP statute, certainly the procedural provisions under
17 CPLR 3211 and I forget what the summary judgment is. 3216.
18 Those clearly do not apply in federal court, and I don't think
19 there is any disagreement with that, other than this Maine
20 decision applying First Circuit law for *Erie* purposes.

21 THE COURT: Now, what about the question I asked your
22 adversary. Put aside the question of whether you would forfeit
23 it or not forfeit it. If I allowed her to amend, and if your
24 client claimed that there was no substantial basis for Trump's
25 counterclaim against you under the statute law, would you or

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1 would you not be obliged under Rule 13 to file such a claim
2 against him for bringing this application or forfeit it?

3 MS. KAPLAN: We would certainly have to answer. We'd
4 certainly forfeit the claim if we didn't file it. I haven't
5 thought about the question, your Honor, of whether we have the
6 right to file it. But I can guarantee if we do, we will for
7 sure.

8 THE COURT: Let's just hypothesize that you would have
9 the right and that you would. Can you conceive of any way to
10 resolve the conflicting claims that each side's position lacked
11 a substantial basis, without getting to the merits of the
12 underlying case?

13 MS. KAPLAN: I don't, your Honor. I've been thinking
14 about this quite a bit in another context, which is how, even
15 if they could make the arguments they wanted to make here, how
16 would they properly be made. And I think in this case, given
17 where we are, 12(c) won't do them any good because if you look
18 at --

19 THE COURT: Slower, slower.

20 MS. KAPLAN: Rule 12(c), they've already answered.
21 Rule 12(c) doesn't do them any good because if you look at
22 their proposed amended answer and counterclaim, it is all upon
23 information and belief. So your Honor can't look at that and
24 say no substantial basis in law or fact obviously.

25 And Judge Castel in the *Zalmayev* case basically held

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1 quite correctly that once a case goes to a jury -- let me put
2 it this way. You are not going to let a case go to a jury that
3 has no substantial basis in law or fact. So even in the I
4 think impossible event that Ms. Carroll were to lose this case
5 before a jury, that would not be no substantial in law or fact.

6 THE COURT: At the end of the day, doesn't it
7 probably, maybe inevitably but I'm not sure, come down to this.
8 It is a classic, at least as far as I understand the facts, a
9 he-said-she-said case. And Mr. Trump denies it ever happened
10 and says various other things. And Ms. Carroll says it
11 happened.

12 Now, surely if she prevails on the merits that it
13 happened, there was a substantial basis, that's obvious. Now,
14 I imagine there are ways in which the claim might be defeated,
15 irrespective of whether it happened. But I haven't, you know,
16 I don't know exactly what they might be. I suspect if the
17 claim is ultimately resolved by your position on the Westfall
18 Act being rejected in the circuit and maybe the Supreme Court,
19 and the government being substituted and the claim dismissed
20 under the defamation exception to the Federal Tort Claims Act,
21 the case, the claim would be defeated, but I can't imagine how,
22 given the enormously unsettled nature of all of the questions.
23 And also the fact that the attorney general did not remove the
24 case for well over a year, that it would be very difficult to
25 say with a straight face that that rendered the claim without

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1 substantial basis. So, I wonder what the heck we're talking
2 about here.

3 MS. KAPLAN: I agree, your Honor. And I think we are
4 getting to the same place. What I was going to say, you heard
5 Ms. Habba talk about a summary judgment motion. If she wants
6 to make a summary judgment motion in this case, I think it
7 would be for sure denied. But if she wants to make a summary
8 judgment motion, and show somehow applying the Rule 56
9 standard, but show somehow so there is no material dispute of
10 fact, but show somehow that this case has no substantial basis
11 in law or fact, I think she is certainly free to make the Rule
12 56 motion.

13 To be honest, your Honor, I heard her say that. We
14 would be happy for her to make that motion because we'd like to
15 get on with discovery. So, and we think discovery in this case
16 is very, very fast. We do not seek to depose President Trump.
17 He can depose our client. He can depose the other two women
18 who she told contemporaneously when it happened. And we'd like
19 his DNA. That's it.

20 And based on that discovery, they want to make a Rule
21 56 motion, with respect, they should be our guest and do that,
22 because we'd like to get this case going and we think that
23 discovery should happen.

24 That's the only possible basis in the procedural
25 context of this case that they could properly establish,

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1 assuming you were to allow them to amend. They could possibly
2 establish the standard that's required under the New York
3 statute that there is no substantial basis in law and fact in
4 this case. In fact, it is not law. It would have to be fact.
5 On the law question, I agree with your Honor under Westfall Act
6 all you have to do is listen to the questions of Judge
7 Calabresi on the Second Circuit to understand how unsettled the
8 law in this area is.

9 THE COURT: Yeah. Yeah. Okay. Anything else you'd
10 like to say on your side?

11 MS. KAPLAN: I'm looking to my colleague who is
12 shaking his head no. So I think that's it from us, your Honor.

13 THE COURT: Thank you, Ms. Habba. Brief rebuttal if
14 you care to.

15 MS. HABBA: My co-counsel will take rebuttal, your
16 Honor.

17 THE COURT: Okay.

18 MS. HABBA: Michael Madaio.

19 THE COURT: Thank you.

20 MR. MADAIIO: Your Honor, I just wanted to address a
21 couple points that opposing counsel raised. The first issue is
22 in terms of a substantial basis in law. Defamation you have to
23 plead either special damages or defamation per se. Neither are
24 pled in the complaint. That's exactly how we would show there
25 is no substantial basis in law for this case, which is why we

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1 would be entitled to bring such a motion under anti-SLAPP.

2 In terms of the case law, there is no Second Circuit
3 case that's on point dealing with anti-SLAPP. I understand
4 there is *La Liberte*, but that dealt with California's
5 anti-SLAPP law. Not New York's. There has not been a Second
6 Circuit decision on that case that's on point in terms of New
7 York's anti-SLAPP. So again, that remains unsettled. And at
8 this point in the litigation, again, to echo what Ms. Habba
9 said, we are only seeking to preserve our right for this point
10 for our client.

11 And these are issues that we would like to raise down
12 the road. For example, the attorneys' fees. This is something
13 that it can't possibly be considered futile if down the road
14 our client would be entitled to receive attorneys' fees if he
15 wins at trial, which could potentially be hundreds of
16 thousands, a significant amount of money in terms of --

17 THE COURT: But it would be futile if the statute
18 doesn't apply in federal court.

19 MR. MADAIIO: Well, I believe the question is whether
20 or not the motions apply in federal court, you know, in terms
21 of the Federal Rule 56 and Federal Rule 12(b)(6). But, the
22 attorneys' fees is a separate issue. And I don't believe that
23 that would be in conflict with federal law.

24 THE COURT: Rule 11 sets a federal standard for when
25 you get sanctions for what I'll loosely refer to as filing or

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1 continuing a baseless claim. And it sets out what the remedies
2 are. And they're different than New York does.

3 MR. MADAIIO: Right. But under 70 anti-SLAPP, the
4 attorneys' fees are a statutory right to recover attorneys'
5 fees which I believe would be in addition to Rule 11. I don't
6 see it as being inconsistent. There are cases that have
7 held --

8 THE COURT: Sure they're inconsistent. Because 76-a
9 says -- if I can find it quickly -- that you may recover
10 damages where it is established that the communication which
11 gives rise to the action was made with knowledge of falsity or
12 reckless disregard. Right? That's what you're referring to.

13 MR. MADAIIO: I believe it is actually 70-a.

14 THE COURT: 70-a. Thank you. So, in 70-a, it says
15 attorneys' fees shall be recovered, mandatory, upon a
16 demonstration no substantial basis. Right? That's what you
17 are talking about.

18 MR. MADAIIO: Yes.

19 THE COURT: And Rule 11 says, Federal Rules of Civil
20 Procedure says by presenting to the court any pleading, motion,
21 or other paper, an attorney or unrepresented party certifies
22 that to the best of the person's knowledge, etc., it is not
23 being presented for any improper purpose, the claims or
24 defenses are warranted by existing law or non-frivolous
25 argument to extend it, the factual contentions have evidentiary

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1 support, or if specifically so identified will likely have
2 evidentiary support. And there is another provision that's not
3 particularly germane. But that's their standard in the Federal
4 Rule 11.

5 And then it says, that if there has been a violation
6 of 11(b), which is what I just summarized, the Court may impose
7 an appropriate sanction on any attorney, law firm, or party
8 that violated the rule or is responsible.

9 Now the first point of difference is New York says
10 "shall" and the federal rule is "may" and leaves it up to the
11 judge. So, that's a fundamental difference. It is a conflict.
12 And then, under Rule 11(c)(4), it says a sanction imposed under
13 this rule must be limited to what suffices to deter repetition
14 of the conduct. It may include non-monetary directives, an
15 order to pay a penalty into court, or if imposed on motion,
16 etc., an order directing payment to the movant of all or part
17 of the attorneys' fees.

18 Now, so the federal standard is more protective of the
19 party asserting the claim. The imposition of sanctions is
20 entirely discretionary with the Court, not mandatory. And the
21 extent of the remedies is circumscribed, unlike the state
22 provision. Flat conflict up and down the line. Now, then
23 *Pappas* says in dealing with the question of when something is
24 substantive and when it's procedural, procedure is the judicial
25 process for enforcing rights and duties recognized by

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1 substantive law and for justly administering remedy and redress
2 for disregard or infraction of them.

3 Now, it certainly seems to me that the whole process
4 of sanctions under Rule 11 is the process for justly
5 administering remedy and redress for disregard or infraction of
6 Rule 11(b). That's what it is all about. Isn't it?

7 MR. MADAIIO: Your Honor, I would say there are two
8 different questions that are being asked. Sanctions are not
9 the same as what anti-SLAPP offers in terms of attorneys' fees.
10 It is just an additional way to get that recovery. There are
11 many ways to get attorneys' fees. Just like there are many
12 ways to get any sort of recovery in terms of if you are talking
13 about punitive damages or something like that.

14 Just because there is one route you can get it, that
15 that doesn't mean that's the only way you can get it.

16 THE COURT: Except that *Erie v. Tompkins* and *Hanna v.*
17 *Plumer* says that in a federal court, there is one way. One
18 way. The federal way.

19 MR. MADAIIO: Right. But in anti-SLAPP, it is an
20 affirmative counterclaim that we are seeking here, so it is
21 essentially a claim on its own where you are seeking the
22 attorneys' fees.

23 THE COURT: You can call it a zebra but it is still
24 inconsistent with the federal law.

25 MR. MADAIIO: I think it is important that it is a

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1 counterclaim that you are filing.

2 THE COURT: Why?

3 MR. MADAIIO: Because it is affirmative relief that you
4 are gaining as opposed to being sanctioned for bad faith
5 conduct.

6 THE COURT: So what?

7 MR. MADAIIO: So I think that makes --

8 THE COURT: It need not be bad faith conduct under
9 Rule 11.

10 MR. MADAIIO: Well, I think it asks different
11 questions. I think therefore it is not inconsistent with what
12 the federal rules say.

13 THE COURT: I understand your position.

14 MR. MADAIIO: Again, I understand they are not binding
15 decisions, but there have been courts that have found the same
16 exact thing.

17 THE COURT: Mostly not, though.

18 MR. MADAIIO: Correct. But there hasn't been any
19 Second Circuit decision directly on point.

20 THE COURT: I understand that. That's why I can do
21 what I think is the right result here, and maybe the Second
22 Circuit will agree with it and maybe not.

23 MR. MADAIIO: Our position is that given how unsettled
24 the law is on this issue and how new the law is, that we think
25 it would prejudice our client very much to completely foreclose

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1 his ability to raise any of these possibilities at this point
2 in the case. That includes the attorneys' fees, that includes
3 motion to dismiss, motion for summary judgment. All the
4 remedies under anti-SLAPP.

5 THE COURT: I have your point. Thank you very much.

6 MS. KAPLAN: Very briefly, your Honor, at paragraph
7 129 of the complaint in response to what my colleague said, we
8 said that Trump's false and insulting statements about Carroll
9 were defamation per se. They tended to and did damage Carroll
10 and her trade, occupation and her business. And then we go on
11 to detail all the evidence and allegations about that, so that
12 would not be correct.

13 THE COURT: Okay. All right. I thank you. I have a
14 deliberating jury. I'd love to continue talking about this,
15 but I have to get back to the other case.

16 Thank you, folks.

17 (Adjourned)